Roemer Industries, Inc. *and* United Steel Paper & Forestry Rubber Manufacturing Energy Allied Industrial and Service Workers International Union, AFL-CIO, CLC. Case 08–CA–124110

May 28, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On November 5, 2014, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Roemer Industries, Incorporated, Masury, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. May 28, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

LerVal M. Elva, Esq. and *Iva Y. Choe, Esq.* for the General Counsel.

Matthew D. Austin, Esq. (Roetzel & Andress, LPA), of Columbus, Ohio, for the Respondent

Nancy A. Parker, Esq. (United Steelworkers of America), of Pittsburgh, Pennsylvania, for the Charging Party

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves an employer that disciplined two employees, each an elected union representative, for their conduct in investigating a grievance dispute, and additionally, further disciplined one of the two employees for negative comments he made to coworkers about another coworker, after the coworker reported him to management for involving him in the grievance investigation. The government alleges that these disciplinary actions constitute unlawful discrimination against employees engaged in union activity protected by the National Labor Relations Act (the Act).

The employer's defense is that it took action against the employees for misconduct unprotected by the Act. As discussed herein, the defense is meritless under the facts here. As for the 1-day suspensions, there was no misconduct—egregious or even slight. Rather, the employees were disciplined for engaging in the most routine of activities related to investigation of a grievance: finding out what happened and seeking a witness for an eventual arbitration. The Act protects the right to question a coworker about a grievance in an unthreatening and uncoercive manner, as happened here, even if the coworker is upset and unhappy to have been involved in the investigation. As to the allegedly disparaging comments that prompted the 3-day suspension, informing coworkers about another coworker who reported the union representative to management for lawful union activity is hardly conduct for which the protections of the Act can be lost. This is true notwithstanding that it involved speaking negatively (but notthreateningly, profanely, or abusively) of the coworker. As discussed herein, I find that the only accusation against either employee that could be labeled as serious misconduct—the employer's assertion at trial that the employees attempted to procure false testimony from their coworker—is an after-the-fact invention of the employer, presented solely through hearsay testimony from management witnesses and without contemporaneous corroboration that one would expect were the allegation true, or even believed by the employer. In sum, this employer has penalized routine grievance handling and the expression of differences of opinion between coworkers, a result that is inimical to the most fundamental precepts of the Act.

STATEMENT OF THE CASE

On March 10, 2014, the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility resolutions, Member Johnson would not rely on the judge's analysis of the note supervisor Ann Fraley created shortly after her September 11, 2014 meeting with employee Brad Johnson and Union Representative Ronald Merrick.

In adopting the judge's finding that the Respondent unlawfully issued a 3-day suspension to Merrick, we note that even assuming *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is applicable, as the Respondent contends, the Respondent has not made any argument showing that the General Counsel failed to meet his initial burden, and the Respondent has additionally failed to provide any evidence that it would have disciplined Merrick even in the absence of his protected concerted activity.

Workers International Union, AFL–CIO, CLC (Union) filed an unfair labor practice charge alleging violations of the Act by Roemer Industries, Inc. (Roemer), docketed by Region 8 of the National Labor Relations Board (Board) as Case 08–CA–124110. Based on an investigation into the charge, on May 30, 2014, the Board's General Counsel, by the Regional Director for Region 8 of the Board, issued a complaint alleging that Roemer violated the Act. Roemer filed an answer denying all alleged violations of the Act.

A trial was conducted in this matter on August 26, 2014, in Cleveland, Ohio. Counsel for the General Counsel, the Union and Roemer filed posttrial briefs in support of their positions by October 6, 2014. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

Roemer is an Ohio corporation with an office and place of business in Masury, Ohio. It is engaged in the manufacture and the nonretail sale of custom graphic industrial identification products. Annually, in conducting its operations, Roemer sells and ships from its Masury, Ohio facility, products, goods, and materials valued in excess of $50,000 directly to points outside the State of Ohio. Roemer admits that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Roemer further admits that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Below, I first set forth my findings of fact, based on consideration of the record as a whole.

Second, I discuss separately my discrediting of the factual assertion advanced by the Respondent that the union officials involved in this case attempted to obtain false testimony from their coworker. For reasons discussed herein, I find that the evidence does not support that claim, or the claim that the Respondent's management officials believed it to be true at the time they disciplined the union officials.

Finally, based on the factual findings, I turn to analysis of the allegations that the Respondent's conduct in disciplining the union officials' violated the Act.

I. FINDINGS OF FACT

Background

Respondent Roemer manufactures graphic industrial identification products including nameplates, labels, panels, and metal and plastic details. It has been in business since 1937.

For many years (the record evidence indicates since at least 1992), Roemer's production and maintenance employees have been represented for purposes of collective bargaining by the Union (or its predecessor). The current collective-bargaining agreement between Roemer and the Union was effective February 22, 2013. The agreement provides for a grievance procedure culminating in arbitration for resolution of disputes.

Since 1986, Roemer has been owned by the current CEO, Joseph O'Toole. Roemer's production supervisor is Ann Fraley.

Ronald Merrick is a 20-plus year Roemer employee and the elected union unit chair for the Roemer employees. Geraldine Dolata is a 15-plus year Roemer employee and the elected union unit griever.

Investigation of the Haas Grievance

In early September 2013, a Roemer employee, Bruce Haas, was given a 3-day suspension for incorrectly cutting parts. Based on Haas's cuts, another employee, Brad Johnson, had problems shearing the parts later in the production process. Johnson showed Roemer's production supervisor Fraley the "bad cuts" made by Haas. According to Johnson, Haas's cuts "weren't square."[1] In addition, Johnson testified that while Haas's parts were originally printed square (before Haas cut them), the parts were "different size sheets." Both of these could be (and according to Johnson, were) true at the same time: according to Johnson "they could be different size sheets and they could be unsquare cut at the same time."

Haas grieved his discipline pursuant to the dispute resolution procedures set forth in the collective-bargaining agreement. Union Representatives Dolata and Merrick decided to speak to Johnson as part of their investigation of the Haas grievance. Dolata knew in advance that Johnson was unlikely to want to talk with them and told this to Merrick, but they went forward to speak with him on the morning of September 11, 2013.

That morning Dolata and Merrick had an approximately 3 to 5-minute conversation with Johnson before the 7 a.m. shift by the back entrance door to the workshop area of the facility. Johnson was sitting on a wall just outside the facility smoking a cigarette. Dolata called Johnson over. Johnson got up and walked over to them. There were other employees around the area but no one else could hear their conversation. Dolata testified that she asked Johnson "what exactly was the problem with the [Haas] job because we had heard that they were unsquare and then that the sheets were uneven cuts." Merrick testified that they asked Johnson "whether he thought that the parts were unsquare or whether they were different sizes or what he thought the problem could possibly have been." According to Merrick, Johnson replied that "he sheared three sides of the sheets without a problem and that he had an issue when he went to the fourth side." Johnson testified that Dolata asked him whether the parts he was shearing were "printed square or was it different sizes." Johnson testified that he told Dolata, "that they were printed squared and they were all different sizes." Johnson, Dolata, and Merrick testified that Merrick then asked if Johnson would be willing to testify in front of an arbitrator as to that. Upon hearing that, Johnson testified that "I was like Wow." By the account of all three, Johnson did not answer the question. He shook his head or shrugged his shoulders and walked away. Dolata and Merrick went into the building to begin their 7 a.m. workshift. Merrick and Dolata testified without contradiction by Johnson that there were no raised voices, threatening statements, or hostility displayed by anyone

[1] Johnson explained that this meant the cuts were not at 90 degree angles, and as a result the sides of the cut square were not the same size.

during this discussion. Johnson's account of the meeting also did not describe any such conduct or affect. Merrick and Dolata testified that they saw no outward indication that Johnson did not want to talk to them.[2]

Johnson complains to Fraley; the Employer disciplines Merrick and Dolata

Johnson was upset by the prospect of testifying at an arbitration hearing. At the hearing in this matter, Johnson testified that, at work that morning, after the conversation with Dolata and Merrick, he started to think about the conversation. "I just didn't want to get involved. . . . Like I didn't want to be here today, I just didn't want to get involved, because I—I just didn't."

When Johnson saw Production Supervisor Ann Fraley making her morning rounds through the shop, Johnson asked to speak to her. Johnson appeared upset and his hands were shaking. Fraley said they should go to her office. Once there, Johnson testified that he said that "Gerri and Ron asked me to—what was wrong with the sheets. . . . [A]nd I said they wanted me to testify against Bruce on—or for Bruce and I don't want to do it, I don't want to be involved." According to Fraley, Johnson asked Fraley to "talk to Ron [Merrick] and ask him to leave me alone." Fraley told Johnson to remain in the office and she called Merrick into her office.

With Johnson present, Fraley told Merrick that Johnson did not want to be involved. As Johnson explained: "Ann said, Ron, he doesn't want to—you guys asked him to testify for Bruce and he doesn't want to do it." Merrick testified that Fraley "told me that Brad did not want to participate in the investigation, that he was having heart problems." Merrick said nothing of substance in reply (he said, "whatever," according to Fraley). Fraley then asked Merrick to leave. There was no raised voices or overt hostility in this meeting, although Johnson testified that he could "tell [Merrick] was mad in his voice because his answers were like real short and they were like Yes and kind of like that."

Merrick was, indeed, upset. He left, slamming the office door behind him, and walked through the shipping area speaking loudly. Neither Fraley nor Johnson could hear what he was saying, but heard the sound of his voice. Merrick testified that as he walked through the shipping area he "mumbled [']backstabber[']and [']couldn't be trusted[']and proceeded to my workstation." Later that day, September 11, when clocking out at 3:30 p.m., Johnson encountered co-employee Shane Merchant. Merchant told Johnson that he had heard from Merrick that he was not "supposed to trust [you] because you're a backstabber and you're not to be trusted." The next morning, Johnson reported this to Fraley.

On September 11, after the meeting with Johnson and Merrick, Fraley wrote an account of the meeting. She wrote, signed, and dated (9/11/13) the following account of the meeting "[t]o make sure that . . . I had proof that Ron was making Brad upset":

> On 9/11/13 shortly after Brad Johnson started working he came to me to ask me if he could talk to me. Brad was pretty upset and shaking. He told me that he does not want involved [sic] in Bruce Haas's grievance. He said Ron Merrick & Gerrie Dolata questioned him. He asked me to call Ron to my office to let him know that Brad does not want involved [sic]. Brad said he has heart problems and can't deal with it.

Fraley testified that she reported her conversation with Johnson and Merrick to O'Toole, the owner and CEO of Roemer. O'Toole makes most of the disciplinary decisions at Roemer. O'Toole testified that Fraley told him "about Brad Johnson coming to her trembling and upset that he was being involved in a previous grievance investigation and hearing."

O'Toole did not remember anything else about the conversation, or much else about his subsequent "investigation." He testified that he "investigated further," and "had discussions with other people in management" but could not remember who they were. According to O'Toole, if he talked to other employees, "I don't remember who it was." O'Toole testified that "I believe I talked to Johnson myself." However, I discredit this unconvincing claim.[3]

O'Toole said he wanted to determine "whether or not there was a bullying situation going on." O'Toole did not speak to Merrick or Dolata about the incident before making his decision to discipline them. O'Toole testified that "I was convinced that there was some sort of bullying going on where [Johnson] he was being pressured to do something against his will. So I made the decision based on that, that discipline needed to be issued." According to O'Toole, the matter required a suspension because "[t]he action [Dolata and Merrick] took struck some fear in Johnson." O'Toole said that he was not sure what

[2] The Respondent contends in its brief (without any evidentiary basis at all) that Merrick sought testimony from Johnson regarding the tolerance limits permitted for Haas's cuts. Yet, Fraley corroborates that the issue discussed by Merrick and Johnson (as she heard about it) involved the issue of "unsquare [cuts]" and "different sizes." I note that the Respondent argued in its April 21, 2014 position paper submitted to the Region during the investigation of this case that the question of tolerance limits was the focus of the Merrick/Johnson incident. However, this went unmentioned at trial by Johnson, Merrick, Dolata, Fraley, or O'Toole.

[3] Johnson did not recall—and it was clear from his demeanor that he was denying it—having any contemporaneous conversation with O'Toole about the incident. (When the alleged conversation was described to him he replied, "No, I don't—I don't ever recall that"). I believe that Johnson would have remembered talking to the CEO and owner of the Employer about this incident, had it been part of O'Toole's investigation. The matter would have had greater significance to Johnson than to O'Toole. (Indeed, Johnson did remember O'Toole calling him to his office after unfair labor practice charges were filed (which occurred in March 2014) to tell him "there's been Labor Board charges filed against me . . . from Ron Merrick.") In other words, Johnson would be most unlikely to have forgotten that he spoke to O'Toole, the owner and CEO, about the incident if he had. But Johnson credibly did not know of such a conversation. In addition, Johnson is more credible than O'Toole because O'Toole was unsure if he talked to Johnson. When asked about it, O'Toole testified: "I believe I talked to Johnson myself, I'm not sure," before recounting the purported conversation. Given these factors, I credit Johnson's testimony, and find that he did not speak to O'Toole about the incident prior to the discipline being issued and I discredit O'Toole's "belief" that he did.

that "action" was: "I wasn't there. I was just going on the reaction of Johnson."

On September 12, O'Toole conveyed to Dolata and to Merrick (in separate incidents) that they were receiving a 1-day suspension for "intimidation and bullying of Brad Johnson" pursuant to Roemer's "Threats and Violence Policy."[4]

Dolata told O'Toole that "I would not put anybody in that position and make them feel that they were intimidated." Merrick testified that he found out about the suspension from O'Toole and General Manager Mike Farmer, who approached him. O'Toole asked Merrick "why it took two people to investigate or talk to Brad." Merrick told O'Toole that "we normally do things together" and O'Toole told him "[y]ou don't know how much I don't believe you right now." The disciplinary notices were subsequently given to Dolata and Merrick by Fraley in her office at the end of the day.

The disciplinary notices provided to Dolata and Merrick each meted out a 1-day suspension and stated that the violation occurred on September 11, 2013, at approximately 6:55 a.m. The violation was described as: "'Threats & Violence Policy' violation outside employee entrance."

Dolata marked the form's preprinted statement saying that she disagreed with the Employer's description of the violation and wrote: "I was not on Company time when I spoke with employee. I have the right to investigate." Merrick also marked the preprinted statement saying he disagreed, and wrote: "Have the right to investigate grievances & ask questions."

O'Toole also determined that in addition to the 1-day suspension, Merrick should receive a 3-day suspension for telling other employees, after his meeting with Fraley and Johnson, that Johnson was a "backstabber" and was not to be trusted. O'Toole testified that Fraley came to him and told him about Merrick "making some comments to several people at several different times in the shop about not trusting Brad Johnson, he's a backstabber, you guys shouldn't trust him." Fraley did not mention to whom Merrick allegedly said this.

O'Toole did not speak to Johnson or other employees about these comments. He asked Merrick about it. O'Toole testified that Merrick admitted it was true.[5] On that basis, O'Toole immediately decided to issue a notice for an additional 3-day suspension for Merrick, again as a violation of the "Threats and Violence" policy. O'Toole testified that Merrick's comments constituted "bullying another employee, namely Johnson, by going around and besmirching his name, and the investigation was complete upon his admission that he had done it." O'Toole told Merrick that he was getting an additional 3-day suspension.[6]

Merrick received this second writeup from Fraley at the end of the day on September 12, at the same time he received the 1-day suspension. This writeup described the violation as:

> "'Threats & Violence' Policy violation. During the day of 9/11/13 to various employees, Ron accused Brad Johnson of being a 'Back Stabber' and stating that he should not be trusted."

Merrick signed the writeup, marking on the preprinted form that he disagreed with the Employer's description of the violation and writing, "stated my own personal opinion[.] I was not threatening Brad Johnson."

Dolata and Merrick served their respective suspensions and grieved the discipline. At the time of the hearing the grievances were still pending.

Johnson testified that after the incident, he and Merrick never spoke again about the incident or the name calling. They have continued to work together and the interactions have been positive. Dolata described she and Merrick as friends, who speak socially.

Dolata and Merrick are the only two people that have ever been disciplined under the Threats and Violence policy.[7]

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[4] The text of Roemer's Threats and Violence policy is as follows:

Roemer Industries is dedicated to maintaining a work environment which is free from intimidation, threats or violent acts. This includes, but is not limited to, intimidating, threatening or hostile behaviors, physical abuse, vandalism, arson, sabotage, use of weapons, carrying weapons of any kind onto Company property, or any other act, which, in management's opinion, is inappropriate to the workplace. In addition: jokes or offensive comments regarding violent events will not be tolerated and may result in disciplinary measures.

Employees who feel they have been subjected to any of the behaviors listed above are requested to immediately report the incident to their supervisor or a human resource representative. All complaints will be promptly investigated and appropriate action will be taken.

Employees who observe or have knowledge of any violation of this policy should immediately report it to Company management. Employees are empowered to contact the proper law enforcement authorities without first informing management if they believe a threat to the safety of others exists.

Any illegal and/or unauthorized articles discovered on Company property may be taken into custody and may be turned over to law enforcement representatives.

Any company employee who is found to be in possession of prohibited articles will be subject to disciplinary action up to and including termination.

[5] Merrick did not recall O'Toole asking him if he made the comments, but Merrick did agree at trial—albeit in slightly different context—that he made such comments.

[6] Merrick testified that O'Toole told him about the 3-day suspension in the same conversation in which O'Toole told him about the 1-day suspension. O'Toole testified that he informed Merrick of the 3-day suspension in a second conversation several hours after the first. Generally, there was a vagueness in O'Toole's account of all these events, and references by him to his own lack of recollection, that lead me to credit Merrick's account over O'Toole's, including the presence of Farmer (something not mentioned by O'Toole in his testimony). However, I also note that these discrepancies are of little or no import.

[7] I note that the Respondent's brief (R. Br. at 4–5) contains many assertions not based on any record evidence, particularly about the nature of the Haas's discipline and what the Respondent's brief calls the "outlandish" grievance filed over Haas's discipline. In addition, the Respondent's brief attaches what purports to be a copy of the Haas grievance. None of this was proffered at trial. The Respondent claims (R. Br. at 4 fn. 1) that all of this is akin to an offer of proof, evidence that "would have been presented had Roemer been permitted to develop its theory of the case." This is entirely improper. First, no offer of proof was proffered or requested at trial. It is not the Respondent's prerogative to make and grant its own offer of proof in posttrial briefing. See, Fed.R.Evid. 103(a). In any event, as I ruled at trial, anything more than a summary of the Haas grievance (which I permitted) is not

II. THE CLAIM THAT MERRICK OR DOLATA ATTEMPTED TO CONVINCE JOHNSON TO AGREE TO GIVE FALSE TESTIMONY

A central claim of Roemer's defense involves the allegation that when meeting with Johnson regarding the Haas grievance, Merrick and Dolata attempted to induce Johnson to agree to give false testimony in conjunction with the grievance.

I reject and discredit this claim, and even the contention that Roemer's witnesses believed it.

At the hearing, Fraley repeatedly testified that Johnson told her that in his conversation with Merrick and Dolata, Merrick attempted to "get [Johnson] to change his wording" about the Haas grievance.[8] Fraley also testified that she told this to Respondent's Human Resources/Bookkeeping Manager Connie Bistarkey[9] (Tr. 34) and that she told this to O'Toole (Tr. 42). Fraley also testified that she told this to Merrick during the meeting in her office with Johnson and Merrick. (Tr. 150).

In addition, O'Toole testified he talked to Johnson about the conversation with Merrick and Dolata, and Johnson told him "[t]hey wanted him to change his testimony in another grievance" (Tr. 57.); see also (Tr. 58) ("They were trying to get him to change his testimony in an arbitration case.").

I reject these assertions for the following reasons.

First of all, the claim that Merrick attempted to have Johnson change his testimony is based exclusively on hearsay. It is based exclusively on Fraley's testimony about what Johnson told her, and, in one instance, on O'Toole's (previously discredited, see above) testimony about what Johnson told him.

Putting aside for the moment whether Johnson really told either of them this, the truth of the matter asserted—i.e., that Merrick did this—was not testified to by anyone who heard Merrick say it. Dolata did not testify to anything like that being said in the conversation. Neither did Merrick, who took the stand on rebuttal to deny it. And, perhaps most importantly, it is also the case that Johnson—although testifying repeatedly and credibly about the incident with Dolata and Merrick—never made such a claim. On brief, the Respondent suggests that Johnson, Dolata, and Merrick are conspiring to hide what was said in their conversation, but this argument appears to be prompted simply by the lack of first-hand evidence to support the Respondent's claims.

Johnson appeared to me, once on the stand, very willing to testify honestly and capably. Had he given an account consistent with what Fraley and O'Toole claimed he said, the matter might look different. But he did not. At the end of the day, I found Merrick, Dolata, and Johnson credible witnesses. None of them, including Johnson, gave an account of their conversation that could remotely be considered an effort to by Dolata or Merrick to have him "change his testimony." Thus, we have three witnesses giving consistent testimony about their conversation. *Only* hearsay evidence supports the claim that Merrick sought to have Johnson change his testimony. On this record I find it did not happen.

But that is not the end of the evidence. There is still further reason to reject the Respondent's claim that Merrick asked Johnson to change his testimony, and, moreover, reason to reject Fraley and O'Toole's claims that Johnson told them this, or that they believed it.

Had Johnson's complaint to Fraley been that Merrick was attempting to get him to change his statement—a matter that the Respondent's brief emphasizes as the heart of the misconduct justifying discipline—one would expect to see the claim mentioned in the contemporaneous statement of the incident that Fraley wrote immediately after meeting with Johnson and Merrick for the very purpose of documenting the offense. However, Fraley's statement says absolutely nothing about Merrick or Dolata attempting to have Johnson change his statement. Nothing.[10] Were the allegation true, the absence of it from the contemporaneous prior statement is inexplicable, and unexplained. But if the allegation is not true, and is a litigation-inspired invention, then it makes perfect sense that it would be absent from Fraley's contemporaneous account. I go with what makes sense.

But that is not all. Fraley seemed to recognize the problem and when asked by counsel for the General Counsel about her prior statement, she initially denied taking "any notes as part of [the] investigation into Geraldine Dolata and Ronald Merrick's September 11 conversation with Johnson."[11] But it turned out she had. It was her contemporaneous account of events and they omit a central claim of the Respondent's defense. Fraley's evasiveness on whether there were any notes taken on the incident, combined with the omission of the claim from the notes she was revealed to have taken, powerfully support the finding I am making that Merrick and/or Dolata did not try to procure

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relevant to the proceeding. As discussed below, the lawfulness of the Respondent's disciplining of Merrick and Dolata for their actions in investigating the Haas grievance does not turn on the merits of the Haas grievance, or anyone's view of the merits of that grievance.

[8] "He told me that he felt that Ron Merrick was trying to get him to change his wording" (Tr. 24); "he felt that Ron was trying to get him to change his wording, he said" (Tr. 25); "Brad said that they were trying to get him to change his wording" (Tr. 26); Fraley agreed that "Johnson said that Merrick was trying to get him—Johnson to change his statement or change his wording . . . [f]rom unsquare cut to different sizes" (Tr. 44); Johnson "told me that Ron and Gerri were trying to get him to change his wording about Bruce Haas's grievance from unsquare to different sizes only" (Tr. 149).

[9] Bistarkey's name is spelled "Distarkey" in the record. However, in their posthearing briefs, both the Respondent and the General Counsel represent that her correct name is Bistarkey. Given the unanimity of opinion, I amend the record as follows: all record references to "Distarkey" are hereby corrected to read "Bistarkey."

[10] I reproduce, again, Fraley's contemporaneous account:

> On 9/11/13 shortly after Brad Johnson started working he came to me to ask me if he could talk to me. Brad was pretty upset and shaking. He told me that he does not want involved [sic] in Bruce Haas's grievance. He said Ron Merrick & Gerrie Dolata questioned him. He asked me to call Ron to my office to let him know that Brad does not want involved [sic]. Brad said he has heart problems and can't deal with it.

[11] Q. Did you take any notes as part of your investigation into Geraldine Dolata and Merrick's September 11th conversation with Johnson?

A. No.

Q. You took no notes?

A. I took no notes.

false testimony from Johnson, and further, that Fraley did not believe it either.

Fraley's claims are further undermined by her testimony that she got the idea to write the contemporaneous account from Human Resources Officer Bistarkey, whom she says she told the story of the incident to that day, September 11. Fraley claimed she told Bistarkey about what Johnson had said, including that Johnson said that Merrick was "trying to get him to change his wording about Bruce's grievance." After hearing the story, Fraley says that Bistarkey told her, "don't forget to document that." But not only does the document she created, allegedly at Bistarkey's urging, not mention the key claim, but Bistarkey testified that she did not know of the "situation leading to their discipline" before she was provided with the disciplinary writeups to file, something which could not have occurred until after Fraley met with Dolata and Merrick on September 12 when they signed the writeups. Thus, Bistarkey's testimony is irreconcilable with Fraley's claim that Fraley told Bistarkey about the incident on September 11.

In addition to the foregoing, it is also notable that the central charge that the Respondent made at trial against Merrick and Dolata—attempting to induce Johnson to give false testimony to an arbitrator—was not mentioned in any shape or form in the disciplinary writeup of either Merrick or Dolata.

At this point there is a risk of beating a dead horse as to the lack of corroboration for Fraley's claim—a lack of corroboration that is unexplained, inexplicable, and renders her story highly implausible. But for the record, I further note that while Fraley testified that she told O'Toole that Johnson said that Merrick was "trying to get him to change his wording of Bruce Haas's grievance and writeup," O'Toole did not back this up. He testified that Fraley talked to him about the incident, but his account of his conversation (some of which he said he could not remember) contained nothing about anyone trying to get Johnson to change his statement or testimony (Tr. 55). And of course, neither Johnson nor Merrick corroborated Fraley's claims that in the meeting with Johnson and Merrick she told Merrick that Johnson was accusing Merrick of attempting to have Johnson change his testimony.

O'Toole, for his part, did testify that he spoke to Johnson about the incident as part of his investigation and that Johnson told him that "[t]hey wanted him to change his testimony in another grievance." However, I have already discredited O'Toole's testimony that he spoke with Johnson, for the reasons set forth above. Accordingly, O'Toole's assertion that Johnson told him that Merrick and/or Dolata were trying to "change his testimony" must be, and is, discredited.

At the end of the day, Fraley's claim that Johnson told her that he was being solicited to change his testimony is not substantiated and not corroborated, at many and indeed at every point where one would expect it to be, were it true, or even truly believed by the Respondent.[12]

Having said that, I suspect that Johnson's accurate account of what Merrick and Dolata said to him can be spun to include the claim that they wanted him to change his statement *in the specific sense that Dolata and Merrick were looking for whether Johnson could corroborate additional possible sources for the errors found in Haas's work.* But this bears no relationship to the suggestion the Respondent makes on brief—and that I believe Fraley intended to imply—that Merrick and Dolata were attempting to have Johnson "provide false or misleading testimony" (R. Br. at 16; see also R. Br. at 14, 19) and/or that the Respondent believed this to be to be the case. (R. Br. at 10, 15, 16). There is no credible evidence for that. Rather, the lack of direct evidence for it, combined with the lack of contemporaneous corroboration for this claim, strongly suggest that it is a litigation-inspired recent fabrication, developed to create new, additional, and more defensible grounds for the disciplinary action.[13]

Analysis

Legal Framework

The complaint in this case alleges that the suspensions given to Dolata and Merrick constituted unlawful antiunion discrimination in violation of Section 8(a)(3) of the Act. See complaint paragraphs 6–7.[14]

The General Counsel argues that Merrick and Dolata were engaged in protected union activity and were disciplined for conduct that was part of the course of their protected activities (i.e., part of the "res gestae" of their protected union activity).

In considering the General Counsel's claim the first inquiry in the analysis is whether Dolata and Merrick were engaged in protected activity, and specifically, whether the actions for which they were disciplined were part of that protected activity. If so, I must then consider whether the conduct for which they were disciplined was so egregious as to cause them to lose the protection of the Act, and thus permit the employer to lawfully punish them for otherwise protected activities. *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976) (union steward's conduct in processing grievance protected by the Act "unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure"); *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979) ("well-established Board law that a steward is protected by the Act when fulfilling his role in processing a grievance" unless the steward "exceed[s] the line . . . [in a manner] in which the misconduct is so violent or of such character as to render the employee unit for further service") (internal quotations omitted). See also *United Cable Television Corp.,* 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.,* 221 NLRB 309, 315 (1975) ("In order for an employee engaged in such activity to forfeit his Section 7 protection his misconduct must be so 'flagrant, violent, or extreme' as to render him unfit for further service"), enfd. 544 F.2d 320 (7th Cir. 1976).

[12] I note that I decline the Respondent's invitation (R. Br. at 17) to credit Fraley and O'Toole on the grounds that they are management and "management ha[s] no motive to misrepresent what occurred."

[13] In light of my findings, I do not reach the question of whether, had Dolata/Merrick attempted to solicit false testimony from Johnson, or whether, had Roemer disciplined Dolata/Merrick in the good-faith belief that they had, it would change the outcome of this case.

[14] As any conduct found to be a violation of Sec. 8(a)(3) would also discourage employees' Sec. 7 rights, any violation of Sec. 8(a)(3) is also a derivative violation of Sec. 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

It is not without reason that "the Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves." *Health Car & Retirement Corp.*, 306 NLRB 63, 65 (1992), enf. denied on other grounds, 987 F.2d 1256 (6th Cir. 1993), affd. 511 U.S. 571 (1994). "The protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumer Power Co.*, 282 NLRB 130, 132 (1986). "Nevertheless, an employee's otherwise protected activity may become unprotected 'if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language.'" *Honda of America*, 334 NLRB 746, 747 (2001).

Finally, in assessing whether the employees' conduct removed the protections of the Act, the asserted impropriety "cannot be considered in a vacuum" nor "separated from what led up to it." *NLRB v. Thor Power Tool, Co.*, 351 F.2d 584, 586 (7th Cir. 1965); *Emarco, Inc.*, 284 NLRB 832, 834 (1987) ("the [intemperate] remarks of the Charging Parties to Poleri cannot be considered in a vacuum").[15]

The one-day suspensions given to Merrick and Dolata

As to the 1-day suspension for meeting with Johnson, there can be no question but that Merrick and Dolata were engaged in core protected union activity when meeting with Johnson. It is beyond cavil that a union steward's grievance activity is concerted activity protected by Section 8(a)(1) and (3) of the Act. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 422, 436 ("it would make little sense for § 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement"). As the Board explained in *Roadmaster Corp.*, 288 NLRB 1195, 1197, enfd. 874 F.2d 448 (7th Cir. 1989):

> It is well settled that filing grievances under a collective-bargaining agreement constitutes protected concerted activity. Union stewards filing and processing grievances on behalf of other employees similarly enjoy the protection of the Act, even if, while doing so, they exceed the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure. [Footnotes and quotation omitted.]

The protected status of grievance activities extends to all manner of grievance-related conduct, including that at issue here, the investigation of grievances. *Dover Energy, Inc.*, 361 NLRB No. 48, slip op. at 2 (2014) ("Section 7 protects a union steward's activity in seeking information for the purpose of investigating potential grievances under the terms of a collective-bargaining agreement." See also, cases cited therein); *Postal Service*, 252 NLRB 624, 624 (1980) (union steward's effort to investigate grievances was within scope of her official union functions and constituted protected concerted activity; discipline of her constituted 8(a)(3)); *Consumers Power Co.*, 245 NLRB 183, 187 (1979) (steward unlawfully disciplined in violation of Sec. 8(a)(3) for investigating a disagreement which had not yet become a formal grievance); *Postal Service*, 360 NLRB No. 74, slip op. at 7 (2014) ("Indeed, the Board has long made clear that the grievance activities of union stewards are especially important to the effectiveness of contractual grievance-arbitration mechanisms"); *Clara Barton*, supra at 1033 ("It is axiomatic that the processing of a grievance by a steward or a grievant is protected concerted activity. If done pursuant to union responsibilities, it also amounts to union activity").

As Dolata and Merrick were engaged in protected activity when meeting with Johnson, the pertinent question is whether their conduct was so egregious as to cause them to lose the protections of the Act, thus insulating the Respondent for liability for suspending them for engaging in otherwise protected activity.

Given the credited evidence of what happened at this meeting, the answer is obvious. Indeed, as to Merrick and Dolata's meeting with Johnson, there is no credited record evidence of anything that could even be described as misconduct. This was straightforward grievance preparation work. Dolata and Merrick met with the coworker who had discovered and reported the problems with Haas's work. It would be highly unusual and arguably negligent for union grievers investigating a grievance not to speak with a coworker so central to a grievance. As discussed above, I reject and discredit the assertion by the Respondent that in this meeting Merrick or Dolata engaged attempted to have Johnson give false testimony. Rather, Merrick and Johnson asked him about the incident, and whether he would be willing to testify should the matter go to arbitration. There is nothing here that even rises to the level of "misconduct."

Stripped of its discredited claims about what happened at the meeting, the gravamen of the Respondent's defense turns on the claim it was justified in suspending Dolata and Merrick because during the meeting with them, Johnson subjectively felt harassed and/or was upset by Merrick asking him if he would be a witness in an arbitration proceeding. The Respond-

[15] Contrary to the Respondent's argument on brief, this is not an appropriate case in which to apply *Wright Line*, 251 NLRB 1083 (1980). Where an employer defends disciplinary action based on employee conduct that is part of the res gestae of the employee's protected activity, *Wright Line* is inapplicable. This is because the causal connection between the protected activity and the discipline is not in dispute. *Postal Service*, 360 NLRB No. 74, slip op. at 7 (2014); See, *American Steel Erectors*, 339 NLRB 1315, 1316 (2003) (citing *Neff-Perkins, Co.*, 315 NLRB 1229 fn. 2 (1994)). Here, all of the employer's various asserted rationales and permutations for disciplining Dolata and Merrick—including the one I have discredited, i.e., the claim that Merrick and Dolata were seeking to convince Johnson to provide false testimony in an arbitration hearing—assert that the basis for the discipline was conduct that the General Counsel argues was part of the res gestae of the union representatives' course of protected activity of investigating and preparing the Haas grievance. Thus, the analysis does not involve *Wright Line*, but rather the question of whether the employees' conduct was in the course of the protected union activity and, if so, was egregious enough to remove the protections of the Act. If protected, then the 8(a)(3) violation is established because the antiunion motive is not in dispute—the protected union conduct was the motive for the discipline.

ent stresses that Johnson has a heart condition. The Respondent points out that Dolata and Merrick knew that Johnson would not want to talk with them. In the Respondent's view, Johnson's extremely negative reaction—he was clearly upset and complained to management about Dolata and Johnson talking to him—provides grounds for disciplining Dolata and Merrick under Roemer's antiharassment policy. This is a meritless argument.

As noted, as an objective matter, nothing in Dolata and Merrick's conduct toward Johnson removed their conduct from the ambit of protected activity. The evidence does not show any threats, intimidation, profanity, or even hostility or raised voices directed towards Johnson. "The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345, 354 (4th Cir. 2001) ("There would be nothing left of § 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings. . . Such a wholly subjective notion of harassment is unknown to the Act."); *Blue Chip Casino*, 341 NLRB 548, 555 (2004) ("that the employees were subjectively annoyed or angered by [coworker's] conduct" in repeatedly requesting that they attend a meeting with him to present a work grievance to management is irrelevant as "the standard for assessing whether conduct remains protected under the Act is an objective standard. . . . The Act designs a system where . . . it is necessary that discussion among employees and attempts to persuade be robust and vigorous. A necessary consequence of such robust discussion is that some employees may feel annoyed or otherwise upset by the efforts to persuade them. But employees may have to endure some level of annoyance if the Act's goals are to be achieved").

Dolata and Merrick took no action to compel Johnson to speak with them. Johnson was and is free to not cooperate with the Union. He was free to complain to management. But management was not free to punish Dolata or Merrick for noncoercively talking to Johnson about the Haas grievance, even if it upset Johnson, and even if the Respondent insisted on defining Merrick and Dolata's conduct as "bullying" or "harassment." In this regard, I note that, of course, the Respondent's claim that Dolata and Merrick's conduct violated the Respondent's Threats and Violence policy is irrelevant in light of the above discussion. The Respondent cannot enforce a rule that permits an employee to be disciplined for activities protected by the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962); *Consumer Power*, 282 NLRB 130, 132 (1986) ("Respondent's disciplinary policy cannot, at any rate, lawfully 'mandat[e]' that Knight be discharged in violation of [the Act]"); *Consolidated Diesel*, 332 NLRB 1020.[16]

The Respondent's brief also contends—almost exclusively based on nonrecord assertions—that it was free to discipline Dolata and Merrick because their grievance meeting with Johnson was in support of a frivolous grievance. I reject this contention. The merits of the grievance are a matter for an arbitrator, not a basis for the employer to dole out discipline to employees engaged in protected activity. *Caterpillar Tractor Co.*, 242 NLRB 523, 530 (1979) ("Contrary to Respondent's position, the protection of the Act does not depend on the employer's or the Board's appraisal of the merits of the grievance, such as whether the contract disposes of the question raised in the grievance. The merits of the grievance are irrelevant in determining the question of whether a right is protected under the Act"); *Jacobs Transfer Inc.*, 201 NLRB 210, 220 (1973) (discharge motivated by belief that griever was filing baseless grievances to further political ambitions within union violates Section 8(a)(3)).

The Respondent unlawfully suspended Dolata and Merrick for 1 day for their protected union activity.

The 3-day suspension given to Merrick

The Respondent also gave Merrick an additional 3-day suspension. After angrily exiting the meeting with Fraley and Johnson, Merrick walked through the production area stating (in reference to Johnson) that he was a "backstabber" and not to be trusted. The Respondent writes in its brief that it disciplined Merrick because, based on learning about these comments, it "made the reasonable determination that bullying was going on and that discipline was appropriate." (R. Br. at 13.)

Merrick's comments were part of the rest gestae of his protected conduct. Merrick's comments were about, and were a direct outgrowth and result of Johnson reporting the Union's grievance investigation efforts to management. Of course, Johnson was within his rights to do this, but in the most fundamental sense, the grievance and arbitration process is an aspect of collective bargaining,[17] and therefore, a process for which management and labor prepare with an expectation that their investigations and strategies will not be exposed.[18] Thus, putting aside for the moment the manner of Merrick's comments,

[16] I note that the Respondent explained at trial, and stress in their brief, that Johnson has a heart ailment. However, by no evidence was Johnson forced to speak to Merrick or Dolata. By no evidence does Johnson's heart condition render him so fragile that employees cannot speak to him about a grievance while he takes a break before work. Johnson is a longtime employee and union member and was intimately involved in the events that led to Haas being disciplined. He testified without incident at the unfair labor practice hearing. (He may not have wanted to testify, but that is a different issue.) For Roemer to attempt to use Johnson's medical condition as grounds to justify punishing Dolata and Merrick for talking to him about the Haas grievance is not just far-fetched, but unseemly. Merrick and Dolata had every reason and right to approach Johnson before work to discuss the matter with him and ask him to testify in an arbitration.

[17] *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 581 (1960) ("The grievance procedure is, in other words, part of the continuous collective bargaining process. . . . [A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself");

[18] "If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure. This necessity is so self-evident as apparently never to have been questioned." *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977), cited in *Patrick Cudahy, Inc.*, 288 NLRB 968, 971 (1988).

they were wholly related to Dolata and Merrick's protected activity. Indeed, not only were Merrick's statements directly related to his and Dolata's protected activity, his comments were a continuation of this protected activity. Merrick was conveying to other employees that Johnson was someone who would go to management in response to a discussion of his involvement in a union's grievance. The Board should have no view on whether Johnson should have done this, but equally the Board should have no view on Merrick's decision to convey to unit employees his displeasure with Johnson. It is all protected union activity.

Moreover, in considering all the circumstances, it must be remembered that Merrick's comments were inextricably linked with—in a very real sense provoked by—Fraley's directive that the Union leave Johnson out of its investigation. Although not alleged as a violation, there is no doubt that it is inappropriate, at best, for management to intervene in the union's grievance preparation by forbidding the union representative from speaking with a unit employee in a nonwork area before work. That it provoked Merrick's criticism of Johnson is clear.

Thus, Merrick's message to other employees squarely implicated protected union activity. The remaining question is whether the manner in which he made these comments to other employees was so egregious that he lost the protection of the Act.

That is clearly not the case. Merrick's comments contained no threats, no profanity, no abusiveness or violence. He did not confront Johnson, physically, or otherwise, or make his comments to his face. There was no interference with production shown. There is no suggestion that Merrick's comments threatened order or discipline in the facility. Since his comments, Merrick and Johnson have worked together without incident.

In view of all this, Merrick's comments hardly qualify as the type of comments that cause an employee to lose the protection of the Act. See, by way of comparison, the worse but protected conduct in, e.g., *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000) (employer violated Section 8(a)(3) by disciplining employee pursuant to antiharassment policy for calling another employee "a scab" to his face during protected activity); *Tilford Contractors*, 317 NLRB 68, 69 (1995) ("It is well established that some profanity and even defiance must be tolerated during confrontations over contractual rights;" union steward did not lose protection of the Act for confronting employee over concern that contract was being breached, threatening to file internal union charges against him, and telling him "You've got no goddamn business being here," and "The best thing you could do is get the hell away from us"); *Postal Service*, 250 NLRB 4 (1980) (employer violated the Act by disciplining union griever who called supervisor "stupid ass" during discussion of possible grievance).

Finally, I note that Board precedent has left unclear whether a case like this one should be analyzed under the standard set forth in *Atlantic Steel*, 245 NLRB 814 (1979), or, as I have done, based on the totality of circumstances. In a case now vacated and remanded in light of *NLRB v. Noel Canning*, __ U.S. __, 134 S.Ct. 2550 (2014), the Board "acknowledge[d] . . . that Board precedent does not firmly establish" when a case "should be analyzed under *Atlantic Steel* or under a totality-of-circumstances approach" and declined to resolve the matter. *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 5–6 fn. 8 (2012). More recently, and carrying the force of precedent, the Board held the *Atlantic Steel* framework "not well-suited" to address the protected nature of an employees' off-duty use of social media to make comments to other employees or third parties. *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 3 (2014). In doing so the Board emphasized that "[t]ypically, the Board has applied the *Atlantic Steel* factors to analyze whether direct communications, face-to-face in the workplace, between an employee and a manager or supervisor constituted conduct so opprobrious that the employee lost the protection of the Act." Id. slip op. at 4.

In the instant case, the alleged "misconduct" involves employee conduct toward another coworker, not toward a supervisor and management, rendering this not a "typical" *Atlantic Steel* case. However, were I to apply the factors and standards of *Atlantic Steel*, I would reach the same result as I have reached applying the totality-of-circumstances. I stress, again, that in the first incident (the meeting between Johnson, Merrick, and Dolata) there was nothing that could even be called misconduct, or an outburst of any kind, making application of the Atlantic Steel factors unnecessary. As to Merrick's calling Johnson a backstabber and someone not to be trusted, the first *Atlantic Steel* factor looks to the location of the incident. Here, the dispute occurred in the shipping area of the production facility but was not loud enough to be heard in Fraley's office and had no effect on production. Moreover, the Board's chief reasons for this factor—that an outburst against a supervisor (the "typical" *Atlantic Steel* scenario) would tend to undermine the authority of the supervisor (see, e.g., *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005)—is of no application here, as Merrick's comments were not directed toward any supervisor, and, as far as the record reveals, no supervisor was involved or present when Merrick made his comments. Thus, this factor must tend to favor protection under the Act. The subject matter of the comments is the second *Atlantic Steel* factor. Here, as discussed above, the subject matter related to Merrick's complaints about Johnson reporting to management that the union officials wanted him to testify, a subject that weighs in favor of continued protection of the Act. The third *Atlantic Steel* factor is the nature of the outburst. Merrick's outburst was obviously impulsive, and not premeditated, which weighs in favor of continued protection. *Kiewit Power Constructor*, 355 NLRB 708, 710 (2010), enfd. 652 F.2d 22 (D.C. Cir. 2011) (observing that the employee's conduct consisted of a brief, verbal outburst in finding factor weighed in favor of protection). Notably, there was no threat, no violence, and no aggression directed at any person by Merrick. Finally, the fourth *Atlantic Steel* factor concerns whether the outburst was provoked in any way by an employer unfair labor practice. As noted above, it is clearly improper for managers to direct union representatives not to speak to union members. While not alleged as an unfair labor practice, it was a provocation, and Merrick took it as such. This *Atlantic Steel* factor favors continued protection under the Act. *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007) (provocation by employer's director of operations found

pursuant to *Atlantic Steel* analysis although the supervisor's conduct was not alleged as an unfair labor practice). In short, nothing in the analysis of *Atlantic Steel* leads me to conclude that Merrick's comments about Johnson should deprive him of protection of the Act. Were I to apply *Atlantic Steel*, I would find that Merrick did not lose the protection of the Act.

Whatever the framework of analysis, I am unaware of any case in which such a brief, nonthreatening, nonprofane statement of negative opinion about a coworker and his willingness or unwillingness to be involved in union activity led to the loss of the Act's protection. The Respondent's discipline of Merrick for criticizing Johnson for Johnson's reaction to efforts to involve Johnson in a grievance investigation violates the Act.

CONCLUSIONS OF LAW

The Respondent Roemer Industries Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (Union) is a labor organization within the meaning of Section 2(5) of the Act.

The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily disciplining Geraldine Dolata for engaging in concerted and protected union activity.

The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily disciplining Ronald Merrick for engaging in concerted and protected union activity.

The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act

Having found that the Respondent violated Section 8(a)(3) and (1) of the act by discriminatorily suspending employees Geraldine Dolata and Ronald Merrick, the Respondent shall be ordered make Dolata and Merrick whole for any loss of earnings and other benefits suffered as a result of the unlawful actions against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interested at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall compensate Dolata and Merrick for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. The Respondent shall also be required to remove from its files any references to the unlawful suspensions of Dolata and Merrick, and to notify them in writing that this has been done and that the suspensions will not be used against them in any way.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2013. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 8 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent Roemer Industries, Inc., Masury, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Suspending or otherwise discriminating against employees for engaging in union activities protected by the National Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make Geraldine Dolata and Ronald Merrick whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Compensate Geraldine Dolata and Ronald Merrick for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions of Geraldine Dolata and Ronald Merrick, and within 3 days thereafter, notify Dolata and Merrick in writing that this has been done and that the suspensions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Masury, Ohio, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 5, 2014

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or otherwise discriminate against any of you for engaging in union activities protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make Geraldine Dolata and Ronald Merrick whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them.

WE WILL remove from our files any reference to the unlawful suspensions of Geraldine Dolata and Ronald Merrick, and within 3 days thereafter, notify Dolata and Merrick in writing that this has been done and that the suspensions will not be used against them in any way.

ROEMER INDUSTRIES, INC.